UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DAVID B. WATSON, SR. and LINDA WATSON on behalf of ANDREW WATSON,	)	
Plaintiffs	)	
v.	)	***Docket No. 00-215-B***
LARRY G. MASSANARI, Acting Commissioner of Social Security,[1]	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[2]

This Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that Andrew Watson ("Andrew"), who has cognitive/communication problems and low normal intelligence, no longer qualified for childhood disability benefits effective June 24, 1997. I recommend that the decision of the commissioner be affirmed.

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiffs have exhausted their administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiffs to file an itemized statement of the specific errors upon which they seek reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was scheduled to be held before me on August 9, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

As an initial matter, it must be noted that Andrew's parents, who proceed *pro se* on his behalf, failed to appear for oral argument despite notice from the office of the clerk of this court (in response to a motion for change of venue) that they could participate by telephone. *See* Endorsement to Motion for Change of Venue and Motion for Case To Be Remanded Back to the Administrative Law Judge of the Social Security Administration for Reconsideration (Docket No. 15); Letter dated July 23, 2001 to Counsel of Record from Julie G. Walentine, case manager (copy in case file).[3] In this district, oral argument in Social Security appeals is critical inasmuch as it presents the only opportunity for the commissioner to respond to a plaintiff's statement of errors. *See* Loc. R. 16.3(a)(2). Ordinarily, a failure to comply with one of this court's local rules would result in the issuance of an order to show cause why the appeal should not be dismissed. However, inasmuch as counsel for the commissioner represented at oral argument that the commissioner would not advocate dismissal on this basis and in the interest of providing as complete a record as possible for the *pro se* plaintiffs, I will reach the substance of their appeal.

I. Background

Andrew, who was born on August 30, 1991, was determined by age four to have speech and language impairments and borderline to low-average intelligence. Record at 205-06, 208 (report of M. Elizabeth Cuddy, Ph.D.). He began receiving speech and language therapy at the Conley Speech and Hearing Center at the University of Maine, Orono, in October 1994, *id*. at 226 (report of plan of care by Lorriann Orr, M.S., CCC-SLP), and continued to receive special services upon his enrollment

[3] A subsequent motion by the plaintiffs to dispense with oral argument was denied. *See* Endorsement to Motion for Court To Accept Plaintiffs' Written Arguments and All Documents in the File on This Case and Decide This Law Suit on Those Documents and Arguments Plus Written Arguments and Documents by the Defendant as Plaintiffs' Are Refusing To Hold a Phone Conference With the Judge [and] Motion for Recusal (Docket No. 18); Letter dated August 8, 2001 to plaintiffs from Susan L. Hall, case manager (copy in case file).

in public school, *see, e.g., id*. at 145-47 (Individual Education Plan ("IEP") dated November 1, 1996 for kindergarten), 170-79 (IEP dated October 8, 1997 for first grade).

An application for SSI benefits was filed on Andrew's behalf on May 25, 1994. *Id*. at 37. Benefits were denied initially and on reconsideration, following which a hearing was held on June 29, 1995 before Administrative Law Judge James E. Cradock in Bangor, Maine. *Id*. By decision dated December 26, 1995 Judge Cradock granted SSI benefits, finding in relevant part that Andrew suffered from severe speech and language impairments, Finding 2, *id*. at 40, and that, although Andrew had no impairment or combination of impairments that met, equaled or caused the same functional limitations as any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, *id*., he had impairments of comparable severity to those that would disable an adult, Finding 4, *id*. Andrew thus was found to have been under a disability beginning May 25, 1994. Finding 5, *id*.

On or before April 1997 Andrew (via his mother) was notified that his case would be reviewed "to decide if he [was] disabled under the new definition of disability for children." *Id*. at 49. This was a reference to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Public Law 104-193, 110 Stat. 2105 (1996), which had directed the commissioner to make significant changes in the way childhood disability claims were evaluated. Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747, 54,747 (Sept. 11, 2000). Among other things, PRWORA mandated that within one year of its date of enactment the commissioner "redetermine the eligibility of individuals under the age of 18 who qualified for SSI based on disability as of August 22, 1996, and whose eligibility might terminate because of changes made by Public Law 104-193." *Id*. at 54,747-48; *see also* Historical and Statutory Notes, Effective and Applicability Provisions, 1996 Acts, to 42 U.S.C.A. § 1382c ("Notes"). The commissioner was "required to use the eligibility criteria we use for new applicants, not the medical

improvement review standard in section 1614(a)(4) of the [Social Security] Act and § 416.994a [of the commissioner's regulations] that we use in continuing disability reviews (CDRs)." 65 Fed. Reg. at 54,748; *see also* Notes.

PRWORA, in essence, tightened eligibility for childhood-disability SSI benefits, "remov[ing] the comparable severity standard" – *i.e.*, the standard pursuant to which disability for children was judged based on whether it was comparable in severity to that for an adult – "and provid[ing] a new statutory definition of disability for children claiming SSI benefits." 65 Fed. Reg. at 54,747. Under PRWORA, "a child's impairment or combination of impairments [had to] cause more serious impairment-related limitations than the old law and . . . prior regulations specified." *Id*.

PRWORA required that, to qualify for SSI benefits, a child demonstrate "a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i). On February 11, 1997 the commissioner published interim final rules (the "Interim Rules") implementing PRWORA's childhood-disability provisions. 65 Fed. Reg. at 54,747. The Interim Rules established a three-step sequential-evaluation process pursuant to which the commissioner inquired whether a child (i) had engaged in substantial gainful activity; (ii) suffered from one or more severe impairments;[4] (iii) and had an impairment or combination of impairments that met, medically equaled or functionally equaled the Listings. 20 C.F.R. § 416.924(a) (2000) (codifying Interim Rules).

Pursuant to these rules, a child's impairment(s) would be found functionally equal to a listed impairment if (i) the child's condition resulted in "extreme limitation of one specific function, such as

[4] In this context, the word "severe" does not mean "extreme," as in everyday parlance, but rather simply means more than minimal. *See* 20 C.F.R. § 416.924(c) (2000) (codifying Interim Rules) (For purposes of Step 2 in the sequential-evaluation process, "[i]f your impairment(s) is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, we (*continued on next page*)

walking or talking" or "extreme limitations in one [broad] area of functioning or marked limitation in two [broad] areas of functioning"; (ii) the child was subject to "episodic" limitations such as "frequent illnesses or attacks"; or (iii) the child's condition required treatment that itself "cause[d] marked and severe functional limitations." *Id*. § 416.926a(b)(1)-(4). In turn, broad areas of functioning were defined in relevant part as (i) cognition/communication, (ii) motor, (iii) social, (iv) responsiveness to stimuli (birth to age 1 only), (v) personal (ages three to eighteen only) and (vi) concentration, persistence, or pace (ages three to eighteen only). *Id*. § 416.926a(c)(4). For a claimant between the ages of three and eighteen, a "marked" limitation was defined as "'more than moderate' and 'less than extreme[,]' . . . interfer[ing] seriously with the child's functioning"; while an "extreme" limitation would prohibit any "meaningful functioning in a given area." *Id*. §§ 416.926a(c)(3)(i)(C) & (c)(3)(ii)(C).

By initial determination dated June 25, 1997 Andrew's disability was found to have ceased effective June 24, 1997. Record at 56. An appeal was taken and a hearing held before a disability hearing officer on August 26, 1997, following which the hearing officer by decision dated October 27, 1997 upheld the initial determination. *Id*. at 71-83. Further appeal was taken, as a result of which a hearing was held before a second administrative law judge, Peter B. Storey, in Bangor on January 5, 1999. *Id*. at 20.

In accordance with the Interim Rules, Judge Storey found that Andrew had not engaged in substantial gainful activity at any time since the date of alleged onset of his disability, Finding 1, *id.* at 18; that he suffered from two severe impairments, cognitive/communication problems and low normal intelligence, Finding 2, *id*.; that he did not have an impairment or combination of impairments meeting or medically or functionally equaling the Listings, Finding 3, *id*.; and that he therefore had not been

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will find that you do not have a severe impairment(s) and are, therefore, not disabled.").

under a disability since June 24, 1997, Finding 4, *id*. On January 18, 2000 the Appeals Council declined to review the decision, *id*. at 3-4, making it the final determination of the commissioner, 20 C.F.R. §; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).[5]

II. Discussion

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiffs have filed no itemized statement of errors as required by Local Rule 16.3(a)(2)(A). I construe their amended complaint, together with a brief filed in connection with their motion for change of venue and remand, as most closely approximating (and thus constituting) their statement of errors for purposes of this appeal. *See* Model Complaint in Social Security Appeal ("Complaint") (Docket No. 4); Arguments for Andrew Watson's Law Suit ("Brief"), filed with Plaintiff's Amendment to Motion for Change of Venue and Motion for Case To Be Remanded, etc. (Docket No. 17).[6]

The Complaint and Brief fairly can be read to contest the findings of Judge Storey on the following grounds, the merits of which I address *seriatim*:

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[5] On September 11, 2000 the commissioner published final regulations implementing PRWORA (the "Final Rules"), effective January 2, 2001. 65 Fed. Reg. at 54,747. The Final Rules do not apply to this appeal. *See id*. at 54,751 ("With respect to claims in which we have made a final decision, and that are pending judicial review in Federal court, we expect that the court's review of the Commissioner's final decision would be made in accordance with the rules in effect at the time of the final decision.").

[6] Counsel for the commissioner stated at oral argument that he had no objection to my construing these documents in this manner.

1. That Andrew automatically qualifies for SSI benefits on any of the following three bases: (i) he is performing at an academic level at least eighteen months or two years behind that of his peers, and a child need be only at least twelve months behind his peers to qualify for benefits, Complaint at [1]-[2]; Brief at 2,[7] (ii) he has attention deficit disorder ("ADD"), Brief at 9, and (iii) he suffers from cerebral palsy, *id*. The plaintiffs do not cite, nor can I find, any rule that a child whose academic performance is at least twelve months behind that of his peers qualifies for SSI benefits on that basis alone. Pursuant to the Interim Rules, which are controlling here, such a circumstance is but one factor taken into consideration. While some behavioral problems were noted, *see, e.g.*, Record at 240 (report of Michael Hill, Ph.D.), 247 (report of Craig E. Stenslie, Ph.D.), there is no medical evidence of record that Andrew ever was diagnosed with ADD. Nor is there evidence that he was diagnosed with cerebral palsy.[8] In any event, the existence of either condition does not automatically entitle a child to SSI benefits; whether a child is considered "disabled" depends on the degree of functional restriction in his or her case. *See* Listings 111.07 (describing required level of severity to find cerebral palsy disabling), 112.11 (describing required level of severity to find ADD disabling).

2. That the law governing children's SSI benefits did not change subsequent to Judge Cradock's decision, and thus Andrew remains entitled to benefits on the basis that his disability is comparable in severity to that of an adult. Complaint at [2]; Brief at 1-3, 7. For the reasons discussed above, this point is plainly wrong. PRWORA not only created a new analytical framework

[7] In connection with this point the plaintiffs submit new evidence touching on Andrew's recent school progress. *See* attachments to Complaint. The court has "the statutory authority to remand for further proceedings where new evidence is presented after the ALJ decision if the evidence is material *and* good cause is shown for the failure to present it on a timely basis." *Mills v. Apfel*, 244 F.3d 1, 5 (1st Cir. 2001) (emphasis in original). The new evidence is submitted in support of an argument that has no merit (*i.e.*, that Andrew automatically qualifies for SSI benefits because more than twelve months behind his peers academically) and accordingly is immaterial.

[8] As noted by the plaintiffs, Brief at 9, the medical expert present at Andrew's January 5, 1999 hearing testified that "in considering the possible underlying developmental delay, the neurologic problem . . . it could possibly be a minimal motor dysfunction under the cerebral palsy, 111.07, but I don't believe he meets the listing." Record at 32 (testimony of Irwin M. Pasternak, M.D.). This was speculation on the part of Dr. Pasternak, not a diagnosis of cerebral palsy based on examination and/or testing of Andrew.

superseding the comparable-severity test, but also directed that the commissioner reassess children's eligibility pursuant to the new, more rigorous standard.[9] *See, e.g.*, Notes.

3. That Andrew's two brothers continue to receive benefits for the same disabilities that Andrew has. Complaint at [2]-[3]; Brief at 9. Andrew's brothers' cases are irrelevant; what is at issue here is the individualized decision made in his case.

4. That the disability hearing officer made certain specific findings and observations favorable to Andrew, including that he has a "severe" impairment and a "marked restriction" in the category of communication, and that Judge Storey also acknowledged that Andrew's impairments were "severe." Brief at 4-8. Contrary to the plaintiffs' arguments, *id*. at 5, 7-8, neither a finding of "severity" nor a finding of one marked restriction entitles a child to benefits. A finding of "severe" impairment merely means that a claimant has succeeded at Step 2 of the sequential-evaluation process in demonstrating that he or she has more than minimal impairments. *See* 20 C.F.R. § 416.924(c) (2000) (codifying Interim Rules). To qualify for benefits, a child must go on to show, at Step 3, that his impairments meet or medically or functionally equal the Listings. *See id*. § 416.924(d). The existence of one marked restriction does not suffice to prove functional equivalence; rather, a child must demonstrate "extreme" restriction in one broad area of functioning or "marked" restriction in two broad areas of functioning. *See id*. § 416.926a(b)(2) & (c).

5. That a physician (whose name is illegible) "agreed" that Andrew's impairments functionally equaled the Listings. Brief at 5 (citing Record at 54). The plaintiffs misconstrue the document in question, which agrees with the findings of an SSA-538 dated June 18, 1997, an apparent

[9] Alternatively, the plaintiffs request that to the extent there is a choice between the old and new definition of disability, the court apply the old one. Brief at 8. The plaintiffs derive this "choice" theory from the following comment by Judge Storey: "Moreover, the claimant's condition may have improved since the hearing decision in 1995, in which case he may not qualify for benefits under either the old definition of disability or the new." *Id*.; Record at 16. Judge Storey was not suggesting that he (or the plaintiffs) had a choice between definitions, but rather that, even if the commissioner had not been directed by PRWORA to reevaluate Andrew's eligibility (*continued on next page*)

reference to the Childhood Disability Evaluation Form (Form SSA-538-F4) completed by Dr. Stenslie, in which Dr. Stenslie found that Andrew's impairments did not meet, medically equal or functionally equal the Listings. *See* Record at 54-55; 243-47.[10]

The plaintiffs finally contend that the commissioner waived their obligation to repay the sum of $7,610, at least in the event Andrew was awarded back benefits. Complaint at [3]. The plaintiffs elected to continue to receive payment of benefits pending appeal. *See* Record at 62, 85, 94. In so doing they were warned that they would be required to repay these sums if they lost their appeal unless they sought and received a waiver of that obligation. *See id.; see also* 20 C.F.R. § 416.996(g). As an initial matter, it is unclear whether the plaintiffs claim that the commissioner agreed to waive repayment of this sum in the event they lost their appeal. I find no evidence of record that this is so. At oral argument, I inquired whether the commissioner would agree to waive repayment, but counsel for the commissioner stated that he was not prepared to address that question. I therefore make no finding as to this contention, which in any event is peripheral to the matter at hand.

The bottom line in this case is that Andrew lost his benefits as a result of a change in the law. The administrative law judge correctly applied the Interim Rules, making a determination supported by substantial evidence that Andrew no longer was eligible in accordance with those rules. *See, e.g.*, Record at 31-32 (testimony of Dr. Pasternak that Andrew did not meet or equal Listings and degree of limitation in cognitive/communication domain was "[m]ild at . . . the worst"), 243-44 (report of Dr. Stenslie that Andrew's impairments did not meet, medically equal or functionally equal Listings and

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pursuant to the new definition, Andrew still might not have continued to qualify for benefits pursuant to the old one by virtue of improvement in his condition. Nonetheless, PRWORA mandated that Judge Storey apply the new definition, and he did so.

[10] For the sake of completeness, I note that in their initial complaint the plaintiffs made the following additional argument: "Also both of Andrew Watson's parents are disabled, SSI law states that SSI's law on how a child is considered disabled is the same as Social Security law and Socila [sic] Security law states that a child is considered disabled if one of his parent's [sic] is disabled." Lawsuit Petition and Complaint (Docket No. 1) ¶ 4. This is an apparent reference to Social Security Disability ("SSD") provisions pursuant to which a child may be entitled to benefits on the earnings record of a disabled parent, regardless whether the child is disabled. *See, e.g.*, 20 C.F.R. §§ 404.350, 404.353. These SSD provisions have nothing to do with this case, which concerns Andrew's entitlement (*continued on next page*)

that Andrew suffered only from "less than marked" limitation in two domains, cognitive/communication and social).

III. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of August, 2001.

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David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-215

WATSON, et al v. SOCIAL SECURITY, COM Filed: 10/18/00
Assigned to: Judge GEORGE Z. SINGAL
Demand: $0,000 Nature of Suit: 864
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None

to SSI benefits based on his own disability.

Cause: 42:405 Review of HHS Decision (SSID)

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